Supreme Court, U.S.
FILED
APR 28 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1404

IN THE

Supreme Court Of The United States

October Term, 1988

MONSANTO COMPANY, ALLIED-SIGNAL, INC. AND EM INDUSTRIES, INC.,

Petitioners,

v.

UNITED STATES OF AMERICA, SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL IN OPPOSITION TO THE GRANTING OF THE PETITION FOR A WRIT OF CERTIORARI

WALTON J. McLEOD, III
General Counsel
(Counsel of Record)
SAMUEL L. FINKLEA, III
W. THOMAS LAVENDER, JR.
DENNIS N. CANNON, JR.
Counsel
South Carolina Department of
Health and Environmental Control
2600 Bull Street
Columbia, South Carolina 29201
(803)734-4910

April 28, 1989

QUESTIONS PRESENTED

1. May Petitioners raise an asserted failure of the district court to comply with Federal Rule of Civil Procedure 54(b) when the issue was not preserved in the courts below?
2. Was the district court's deferral of the cost apportionment to a possible contribution action error when the undisputed facts in the cost recovery action established joint and several liability and there has been no showing of prejudice?
3. Was the district court's finding of joint and several liability error when the undisputed facts established that the harm at the site was indivisible and that it was impossible to ascertain the degree of relative contribution of each cause to the harm?

LIST OF PARTIES

The parties to the proceeding below were the United States of America, the South Carolina Department of Health and Environmental Control, Oscar Seidenberg, Harvey Hutchinson, Monsanto Company, Allied-Signal, Inc. (formerly Allied Corporation), and EM Industries, Inc.

Table of Contents

	Page
List of Parties	i
Table of Authorities	iv
Opinions Below	1
Statement of Jurisdiction	2
Statutory Provisions Involved	2
Statement of the Case	4
I. THE LEGAL QUESTIONS PRESENTED	4
II. FACTUAL AND PROCEDURAL CONTEXT	6
Reasons for Denying the Writ of Certiorari	8
SUMMARY OF ARGUMENT	8
I. THERE IS NO CONFLICT BETWEEN THE CIRCUITS	8
II. NO IMPORTANT QUESTIONS OF FEDERAL LAW ARE RAISED	9
A. FAILURE TO COMPLY WITH RULE 54(B), FEDERAL RULES OF CIVIL PROCEDURE, WAS NOT PRESERVED BELOW	9
B. DEFERRAL WILL PRESENT NO PREJUDICE	10
C. JOINT AND SEVERAL LIABILITY WAS ESTABLISHED ON THE FACTS OF THIS CASE	13
D. NO VIOLATION OF THE PRINCIPLE OF SEPARATION OF POWERS OCCURRED	14
CONCLUSION	14
Appendix	A-1

Table of Authorities

Cases

	Page
Dedham Water Company v. Cumberland Farms Dairy, Inc., 805 F.2d 1074, 1081-1082 (1st Cir. 1986)	14
Duignan v. United States, 274 U.S. 195, 200 (1927)	10
Lawn v. United States, 355 U.S. 339, 362, n.16 (1958)	10
Youakim v. Miller, 425 U.S. 231, 234 (1976)	10

Page

Statutory Provisions

Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9601 *et seq.*, (1982 and Supp. IV 1986) 8, 19
Section 104, 42 U.S.C. § 9604 6
Section 106, 42 U.S.C. § 9606 6
Section 107(a)(3), 42 U.S.C. § 9607(a)(3) 4, 6, 12
Section 221, 42 U.S.C. § 9631 6
Resource Conservation and Recovery Act, Section 7003, 42 U.S.C. § 6973 (1982 and Supp. IV 1986) 6
SC Hazardous Waste Management Act, S.C. Code Ann. § 44-56-160 (1987) 6

Rules

Federal Rules of Civil Procedure, Rule 54(b) 4, 9, 10

Miscellaneous

Restatement (Second) of Torts 5, 14
Section 433A(2) 5
Section 433B, Comment (d) 13, 14

No. 88-1404

IN THE

Supreme Court of the United States

October Term, 1988

MONSANTO COMPANY, ALLIED-SIGNAL, INC.
AND EM INDUSTRIES, INC.,

Petitioners,

v.

UNITED STATES OF AMERICA,
SOUTH CAROLINA DEPARTMENT OF HEALTH
AND ENVIRONMENTAL CONTROL,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL IN OPPOSITION TO THE GRANTING OF THE PETITION FOR A WRIT OF CERTIORARI

The South Carolina Department of Health and Environmental Control (DHEC) respectfully urges the Court to deny the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported as *United States v. Monsanto Co.*, 858 F.2d 160 (4th Cir. 1988), and can be located in petitioner's petition, Appendix B, pages B-1 through B-30. The order of the Court of Appeals denying petitioner's petition for rehearing and suggestion for rehearing

en banc can be located in petitioner's petition, Appendix A, pages A-1 and A-2.

The opinion and various orders of the district court are reported in *United States v. South Carolina Recycling & Disposal, Inc.*, 653 F. Supp. 984 (D.S.C. 1984).

The district court's order of partial summary judgment (as to liability), filed February 23, 1984, can be located in petitioner's petition, Appendix E, pages E-1 through E-19.

The district court's order of summary judgment (as to cost recovery under CERCLA), dated November 22, 1985, is not included as an appendix in petitioner's petition, but can be located in Respondent DHEC's brief, Appendix, pages A-1 through A-8. The district court's final order, entered August 18, 1986, can be located in petitioner's petition, Appendix G, pages G-i through G-3.

The district court's judgment, entered and filed on September 23, 1986, can be located in petitioner's petition, Appendix D, pages D-1 and D-2.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on September 7, 1988. A timely petition for rehearing and suggestion for rehearing in banc was denied on December 2, 1988. This denial can be located in petitioner's petition as Appendix A at pages A-1 and A-2.

The jurisdiction of the Court is invoked under 28 U.S.C. §1254(1). Respondent South Carolina Department of Health and Environmental Control does not contest the Court's jurisdiction in this proceeding.

STATUTORY PROVISIONS INVOLVED

CERCLA Section 107(a)

(a) Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section . . .

(3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of haz-

ardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances . . .

. . . from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for—

(A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian Tribe not inconsistent with the national contingency plan;

(B) any other necessary costs of response incurred by any other person consistent with the national contingency plan. . . .

CERCLA Section 113(f)(1), (2)
as amended by SARA

(1) CONTRIBUTION.—Any person may seek contribution from any other person who is liable or potentially liable under section 107(a), during or following any civil action under section 106 or under section 107(a). Such claims shall be brought in accordance with this section and the Federal Rules of Civil Procedure, and shall be governed by Federal law. In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate. Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section 106 or section 107.

(2) SETTLEMENT.—A person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding matters

addressed in the settlement. Such settlement does not discharge any of the other potentially liable persons unless its terms so provide, but it reduces the potential liability of the others by the amount of the settlement.

STATEMENT OF THE CASE

I. THE LEGAL QUESTIONS PRESENTED.

This is an appeal from a judgment holding Monsanto Company, Allied-Signal, Inc. and EM Industries, Inc. (the "defendants," "generator defendants" or "petitioners") jointly and severally liable to the United States and South Carolina (collectively called the "plaintiffs" or "governments") under Section 107(a)(3) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA", 42 U.S.C. §9607(a)(3)(1982 and Supp. IV 1986), for response costs arising from the release or threat of release of hazardous substances at the Bluff Road hazardous waste site located near Columbia, South Carolina. Petitioners seek this Court's review of two procedural issues.

The first procedural issue raised in the petition relates to compliance with Rule 54(b), Federal Rules of Civil Procedure. Petitioners' first question states the issue as being whether a trial court can mandate deferral of liability and allocation issues in a cost recovery action under CERCLA without complying with Rule 54(b). In the context of this appeal, allocation should be understood as a reference to *cost* apportionment, an issue of contribution, as opposed to apportionment of the underlying liability.

The procedure followed by the trial court in this case was deferral of the contribution action from the underlying cost recovery action.

The trial court dealt squarely with the question of apportionment of the underlying liability as part of the case-in-chief. The court found the underlying harm to be indivisible and not reasonably capable of apportionment. Thus the trial court held the generator defendants to be jointly and severally liable for cleanup costs. In so finding the trial court noted that *cost* apportionment could be properly dealt with in a later action for contribution. Petition, E-12.

Petitioners now assert that the trial court's deferral of the contribution action is not in compliance with Rule 54(b). However, the question of compliance of Rule 54(b) was never presented to the trial court. Moreover, no reference to Rule 54(b) is found in the petitioners' primary brief in the Fourth Circuit. Petitioners did not complain of the deferral or Rule 54(b) at all until the issue was raised in the petitioners' joint reply brief and answering brief and motion for rehearing before the Fourth Circuit.

The second procedural issue raised by petitioners revolves around the burden of proof for apportionment of liability among the generator defendants. The petitioners argue that under the *Restatement (Second) of Torts*, the burden of apportionment should have been on the plaintiffs in the trial court. Petitioners contend that the courts below erred in placing the burden of proof of apportionment on the generator defendants. However, petitioners ignore the lower court's finding that it was proved by "undisputed facts" that the harm involved was "indivisible" and that on the facts of the case it was "impossible to ascertain the degree of relative contribution of each substance" at the site. Petition, E-11 and E-12. It was on the basis of the *facts* of the case, *established* by plaintiffs, that the district court held defendants jointly and severally liable. The Fourth Circuit agreed with the lower court's finding of joint and several liability.

Section 433A(2) of the *Restatement* provides that damages for harm are *not* to be apportioned among defendants where there is no reasonable basis for determining the contribution of each cause to a single harm. The "undisputed facts" of this case as submitted to the district court established that the harm was indivisible and not capable of apportionment. Petition, E-11 and E-12. The trial court committed no error in finding that defendant-generators had failed to controvert plaintiffs' evidence.

Petitioners also raise a separation of powers questions which the Fourth Circuit refused to consider because it had not been raised before the district court. Petition, B-23, n.30. The Fourth Circuit found no circumstances warranting de novo review of the separation of powers issue.

II. FACTUAL AND PROCEDURAL CONTEXT.

This case arises out of the cleanup of the Bluff Road site, a waste facility, located near Columbia, South Carolina. The Bluff Road site was operated between 1972 and 1980. The petitioners and other generators of hazardous waste contracted with the operators for disposal of hazardous wastes which were sent to the site. Included among those sending wastes to the site were the United States government and South Carolina Department of Health and Environmental Control. During the course of operations, an environmental hazard of staggering proportions developed.

The Federal Government initially filed suit on July 7, 1980, against the site operators and landowner for cleanup, seeking abatement of releases from the site under Section 7003 of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §6973 (1982 & Supp. IV 1986). South Carolina intervened as a plaintiff on June 6, 1981. In the course of discovery, the United States identified a number of hazardous waste generators whose wastes were disposed of at Bluff Road. These companies, including the generator defendants here, were notified that they were potentially liable for cleanup of the site. An agreement was reached with twelve generators and one transporter of waste to perform 75% of the surface cleanup at the site. A partial consent decree enforcing the 75% cleanup was entered by the district court on March 23, 1982. Joint Appendix, 105. The private cleanup operation was completed on October 1, 1982.

A second amended and supplemental complaint was filed on August 4, 1982. Joint Appendix, 122. It added, among others, the non-settling, generator defendants. It also added claims under CERCLA Section 106 (injunctive relief) and Sections 104 and 107 (cost recovery). South Carolina completed the remaining 25% of the surface cleanup using federal money from the Hazardous Substances Response Trust Fund established by Section 221 of CERCLA, 42 U.S.C. §9631, as well as State money from the South Carolina Hazardous Waste Contingency Fund, S.C. Code Ann. §44-56-160 (1985), plus in-kind contribution of other State money to match the federal contribution. Completion of the surface cleanup in July of

1983 mooted the government's request for injunctive relief.[1]

On June 10, 1983, the generators moved for summary judgment on a variety of statutory and constitutional grounds.[2] The United States in turn moved for partial summary judgment (on liability issues only) against the generators, landowners, and site operators. After hearing argument, the district court granted partial summary judgment holding each of the defendant generators jointly and severally liable by Order dated February 21, 1984. The court found that the harm at the site was indivisible and not capable of apportionment, and that the liability of the defendants was therefore joint and several. Petition, E-11 & E-12.

Cross motions for summary judgment on the issue of appropriate costs were filed. In their motion of summary judgment and memorandum in support of motion for summary judgment, both dated February 17, 1984, defendant generators moved that allowable costs be reduced by the amount paid by Eaton Corporation, which settled during proceedings before the district court, and by "amounts paid in the future by others . . ." The district court found that defendants had failed to present any disputed issue of material facts regarding costs. The court concluded that the plaintiffs could recover their legal, administrative, and investigative costs related to the Bluff Road cleanup. The district court noted that the total cost figure submitted by plaintiffs reduced the total by the amount received in settlement from Eaton Corporation. See order dated November 22, 1985, Joint Appendix 687-695. By Order dated December 19, 1985, the district court approved a settlement with Columbia Organic Chemical Company, a named defendant, and specifically stated that the amounts due plaintiffs would be reduced by the amount of the settlement. Petition, F-2. A final order was issued August 15, 1986 (Petition, G-1 through G-3), and a final judgment was entered on Sep-

---

[1]As noted by the district court in its Final Order of August 18, 1986, at 3, Joint Appendix, 707, the instant case has dealt only with the surface cleanup. Subsurface and groundwater contamination at the site are being studied, and may form the basis for future remedial actions and claims related thereto.

[2]Shortly after the generators filed their motion, one of them, Eaton Corporation, entered into a settlement agreement with the United States and the State.

tember 23, 1986, awarding $1,561,134.55 to the United States and $252,489.46 to the South Carolina Department of Health and Environmental Control (Petition, D-1 and D-2). Thereafter, petitioners appealed to the United States Court of Appeals for the Fourth Circuit. While the appeal to the Fourth Circuit was pending, the South Carolina Department of Health and Environmental Control made a payment to the United States for reimbursement of cleanup costs at the Bluff Road site. It is agreed that the amount paid should result in a reduction of the judgment. In due course, the judgment of the district court was affirmed as to all matters before this Court, and the petition for rehearing and suggestion for rehearing en banc was denied.

REASONS FOR DENYING THE WRIT OF CERTIORARI

SUMMARY OF ARGUMENT

The petition for a writ of certiorari should be denied. It raises no issues requiring resolution by this Court. There is no split among the various federal courts of appeals as to the issue of deferral of contribution actions in similar cases, despite petitioners' assertion that such a split is impending.

Petitioners' remaining ground for seeking certiorari is that depending on the outcome of an eventual contribution action, the impact on petitioners may be unfair or unconstitutional. It is premature for petitioners to seek review by this Court. Petitioners acknowledge that a fair and constitutionally sound result can be reached in the "two-separate-actions procedure" ordered by the trial court. Moreover, petitioners present a number of issues which were not presented to the trial court or properly preserved in the Fourth Circuit, and therefore are not properly before this Court.

I. THERE IS NO CONFLICT BETWEEN THE CIRCUITS:

Petitioners allege that the decision below portends an "impending" split among the various circuits. To date the Fourth Circuit is the only court of appeals to have ruled on the issue of deferral of contribution actions under the Comprehensive Environmental Response, Compensation and Liability

Act of 1980. ("CERCLA"), 42 U.S.C. §9601 *et seq.* (1982 and Supp. IV 1986). There is no conflict among the United States courts of appeals as to the question whether, in actions brought for response costs under Section 107 of CERCLA, the trial court is required to decide both liability for response costs and contribution in the same action. Though the petitioners, in support of their prayer for certiorari, refer to district court decisions in other circuits, Petition at 13-17, *passim*, they do not contend that other circuit courts of appeal have addressed the issue. The Fourth Circuit Court of Appeals upheld the district court order directing deferral on the facts of this case. In this case, petitioners decided not to implead other potential third-party generators in the trial court and did not pursue claims for contribution. Rather, petitioners banked their defense on arguing against the imposition of joint and several liability. Now that joint and several liability under CERCLA is well established, this defensive mode is unlikely to present itself. The issue of deferral, as presented in this case, may never be decided by any other federal courts of appeal. Clearly, there is no split among the circuits, either immediate or impending, which requires resolution by this Court.

II. NO IMPORTANT QUESTIONS OF FEDERAL LAW ARE RAISED.

A. FAILURE TO COMPLY WITH RULE 54(b), FEDERAL RULES OF CIVIL PROCEDURE, WAS NOT PRESERVED BELOW.

Petitioners' Question I relates to compliance with Rule 54(b). The trial court's alleged failure to comply with Rule 54(b) was not raised before the trial court and was not presented as an issue on appeal to the Fourth Circuit. There is no reference to Rule 54(b) in petitioners' primary brief before the Fourth Circuit. Rule 54(b) is raised in passing in the petitioners' joint reply and answering brief, at p.18, note 24, and at 21. There, petitioners argued that the district court's "failure to adjust the plaintiff's recovery as a result of their own liability" was error under Rule 54(b). However, in their motion for summary judgment on costs and supporting memorandum, petitioners asked only for reduction in plaintiffs' recovery by the amount of Eaton Corporation's settlement and amounts

paid in the future by others. See Motion for Summary Judgment, February 17, 1984, and Memorandum in Support of Motion for Summary Judgment, February 17, 1984. Not having been preserved below, the issue is not properly before this Court. *Youakim v. Miller,* 425 U.S. 231, 234 (1976); *Lawn v. United States,* 355 U.S. 339, 362, n. 16 (1958); *Duignan v. United States,* 274 U.S. 195, 200 (1927).

Moreover, petitioner's contention that there was a failure to comply with Rule 54(b) is faulty. The district court ruled upon all claims presented. Petitioners did not move before the trial for any adjustment of recovery other than a reduction for amounts paid by Eaton Corporation and other future payments. See Motion for Summary Judgment, February 17, 1984, and Memorandum in Support of Motion for Summary Judgment, February 17, 1984. Adjustment was made for the amount paid by Eaton Corporation, Order dated November 22, 1985; Respondent's App. A-4; and for the amount paid by at least one additional settling party, Order dated December 19, 1985, Petition, F-1 and F-2. Petitioners never pressed before the trial court for any further reduction or contribution. They cannot fault the trial court for not granting such relief.

B. DEFERRAL WILL PRESENT NO PREJUDICE.

Petitioners argue that the trial court's deferral of proceedings that would determine relative contribution from its grant of summary judgment as to liability and response costs constitutes prejudicial error requiring correction by this Court. Petitioners did not resist the issue of deferral in the trial court, nor did petitioners present to the trial court any claims of prejudice by reason of having to bring their contribution claims in a separate action.

In this case, the defendant generators had abundant opportunity, beginning in July, 1982, to pursue contribution claims by filing third party complaints against other potentially responsible parties. Yet between 1982, and January 1984, when summary judgment was rendered, neither Monsanto nor Allied-Signal, Inc., attempted to file third party complaints against other private generators of waste. While it is true that EM Industries, Inc., brought a third-party action against one third-party defendant and its subsidiary, the petitioners neglected to implead any of the other available potentially re-

sponsible parties. Moreover, the petitioners never pressed their counterclaims against the governmental parties.

The transcript of the January 15, 1984, hearing on cross-motions for summary judgment is particularly revealing, at pages 71-73, as follows:

> [DEPARTMENT OF JUSTICE ATTORNEY] MR. PAIR: . . . [T]hey have had the option of bringing in other parties if they felt it appropriate to this lawsuit, and . . . since the time the second amended complaint was filed, which was July of '82, I believe, they have made no effort to do so, except for one, again, who brought in a third party defendant.
>
> Now, they have had access to, and they have known about the other parties. They have had access through discovery, to know who these parties were. They have continually refused to bring these parties into the suit. Now, at this point in time, here we are at summary judgment to allow a continuation for the purpose of bringing new parties in, and to go through new rounds of discovery, and the rights that would be accorded those new defendants, we think at this time is inappropriate, given the fact that these defendants have elected, up to this point in time, not to do so.
>
> * * *
>
> [ATTORNEY FOR DEFENDANT GENERATORS] MR. DIBBLE: . . . I feel that I should point out that the defendants are defending on the basis that there are indispensable parties missing from this action. It is the government's burden to bring them in as defendants. Of course, that defense would have been foreclosed had they [sic] brought them in as third party defendants.
>
> THE COURT: Is that an issue in this case?
>
> MR. DIBBLE: Well, we have raised it in our answers, yes, and all of this of course was done in the vacuum of a statute which has not been construed, and depending on your Honor's construction, we may make

> various motions to recast the action in certain forms, but what we tried to do was, in a vacuum, take every possible position that we could including the fact that this case should be dismissed for lack of indispensable parties.

It was a tactical decision by the petitioners not to maintain any third party complaints against other responsible parties and not to pursue counterclaims against the governmental plaintiffs. As stated, the generator defendants were banking their defense on arguments against the imposition of liability in the first instance and, secondly, against joint and several liability. Not until late in the course of the appeal did defendants seek to take an affirmative position in apportioning responsibility for costs or seeking contribution. The court below properly refused to allow disruption and delay in the governments' action at the eleventh hour.

It is noteworthy that even though the trial court's order granting summary judgment as to liability against petitioners was filed in February, 1984, and summary judgment as to the costs occurred in August, 1984, petitioners made no attempt during this six month period to commence third-party contribution suits. Petitioners had two extended periods of time in which to implead possible third-party defendants. Having waived the opportunity to file third-party complaints for contribution, petitioners have no basis to assert prejudice. Moreover, in generator-defendants' motion for summary judgment regarding costs, and supporting memorandum, both filed February 17, 1984, the only reduction sought by defendants was for the amount paid by Eaton Corporation and other future payments. Defendants did not pursue the relief they now complain is lacking.

As noted, petitioners still have a separate right of action for contribution available in the district court. Petitioners complain that the contribution action "may" result in an unfair or unconstitutional impact. However, petitioners acknowledge that a fair and constitutionally sound result could be reached with the procedure followed by the lower court. Petition, 21. If this occurs, petitioners will *not* be "unfairly saddled" with excessive costs. It is clear that any claim of prejudice is premature and that this case does not present issues requiring review by this Court.

C. JOINT AND SEVERAL LIABILITY WAS ESTABLISHED ON THE FACTS OF THIS CASE.

The trial court found the generator defendants jointly and severally liable for response costs. Petitioners argue in Question III that the decision below, imposing joint and several liability, incorrectly placed the burden of proof as to apportionment of liability on the defendants. Petitioners' argument relies on one sentence from the comments to the *Restatement (Second) of Torts*, §433B, at comment (d). Petitioners argue that where the plaintiffs bringing the cost recovery action also disposed of waste at the site, and thus are also potentially liable for response costs, the burden of proof regarding joint and several liability should be imposed on the plaintiffs. Nothing in the *Restatement* comment requires shifting the burden of proof in a case such as this cost recovery action. But in any event, the trial judge found that based on "undisputed facts" presented by the plaintiffs, the harm was "indivisible" and that it was "impossible to ascertain the degree of relative contribution of each substance" placed at the site. The facts upon which the lower court relied are stated in the Court's opinion. Petition, E-11 and E-12. Under the facts of this case, the trial court's reference to the "defendants' burden" can reasonably be read as a reference to the burden placed on a defendant to come forward with controverting evidence once a plaintiff has made its case. In the hearing before Judge Simons, counsel for defendants acknowledged that the record contained affidavits that "address the lack of ability to apportion" but contained no affidavit establishing the "ability to apportion." Transcript of Proceedings, January 13, 1984, at 57. While defendants may have disagreed during the hearing with the adequacy of plaintiffs' affidavits in establishing the impossibility of apportionment, the trial court made a factual finding that the evidence presented proved the harm to be impossible to apportion. Petitioners did not properly preserve their objection to this factual finding on appeal. Thus, Judge Simons' factual findings rule.

Petitioners seem to argue that §433B, comment (d), of the *Restatement* requires the plaintiff to apportion damages, even when plaintiff has proven the harm to be *indivisible* and not capable of reasonable apportionment. This argument turns the provisions of CERCLA and the *Restatement* on their heads.

The lower courts committed no error requiring correction by this Court, even under the most favorable reading of *Restatement* §433B, comment (d).

D. NO VIOLATION OF THE PRINCIPLE OF SEPARATION OF POWERS OCCURRED.

Question III, relating to separation of powers, is not properly before this Court because it was not properly raised below. Moreover, it cannot seriously be contended that a separation of powers issue exists. The courts below properly decided the procedural issue raised by petitioners. The courts ably reconciled the remedial provisions of CERCLA with the procedural provisions of the Federal Rules of Civil Procedure. The lower courts did not engage in judicial legislation in violation of the principle of separation of powers.

CONCLUSION

The plaintiff proved "by undisputed facts" that the harm at Bluff Road is "indivisible" and that "it is impossible to ascertain the degree of relative contribution" of each cause to the harm. The district court's finding of joint and several liability and its refusal to apportion damages among the defendants was correct under CERCLA and the *Restatement (Second) of Torts*. There has been no error of law. Petitioners have a right to contribution in a separate action. While petitioners are disgruntled with the trial court's deferral of any action for contribution, the petitioners acknowledge that the "two-separate-actions procedures" could lead to a fair and constitutionally sound result. In the meantime, the judgment of the district court should stand. Further delay would defeat the clearly expressed Congressional intent that response costs should be quickly refunded to replenish the Superfund. *See, e.g., Dedham Water Company v. Cumberland Farms Dairy, Inc.*, 805 F.2d 1074, 1081-1082 (1st Cir. 1986).

No conflict exists between decisions of federal courts of appeal, and petitioners have shown no error of law or prejudice to them. For the foregoing reasons, respondent South Carolina

Department of Health and Environmental Control urges the Court to deny the petition for a writ of certiorari.

Respectfully submitted,

WALTON J. MCLEOD, III
General Counsel
(Counsel of Record)
SAMUEL L. FINKLEA, III
W. THOMAS LAVENDER, JR.
DENNIS N. CANNON, JR.
Counsel

Attorneys for Respondent
South Carolina Department of
Health and Environmental Control
2600 Bull Street
Columbia, South Carolina 29201

April 28, 1989
Columbia, South Carolina

APPENDIX

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA COLUMBIA DIVISION

Civil Action No. 80-1274-6

UNITED STATES OF AMERICA,
Plaintiff,
and

SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL,
Plaintiff-Intervenor,

v.

SOUTH CAROLINA RECYCLING AND DISPOSAL, INC.; COLUMBIA ORGANIC CHEMICAL COMPANY; OSCAR SEIDENBERG; HARVEY HUTCHINSON; MONSANTO COMPANY; ALLIED CORPORATION; AQUAIR CORPORATION; and EM INDUSTRIES, INC.,
Defendants,

v.

G. D. SEARLE & CO., and WILL ROSS, INC.,
Third-Party Defendants.

ORDER

Filed
November 22, 1985

This action was brought by plaintiff United States pursuant to Section 107 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), 42 U.S.C. § 9607, to recover costs of removing hazardous substances from the surface of the Bluff Road site, a hazardous waste site located near Columbia, South Carolina. The State of South Carolina entered the action as plaintiff-intervenor and also seeks to recover costs associated with the Bluff Road site.

On February 21, 1984, this court entered Summary Judgment against all defendants except Columbia Organic Chemical Company ("COCC"), holding the defendants jointly and severally liable for costs incurred by the federal and state governments in cleaning up the Bluff Road site. After a bench trial on the issue of COCC's liability, this court entered an Order on August 28, 1984, finding COCC jointly and severally liable. The Orders of February 21, 1984 and August 28, 1984 did not treat the amount of recovery to which plaintiffs are entitled because the complexity of the cleanup hindered plaintiff's efforts to assemble adequate cost data.

Now before the court are Motions for Summary Judgment filed by plaintiff and plaintiff-intervenor as well as Cross-Motions for Summary Judgment filed by defendants Monsanto Company, Allied Corporation, Aquair Corporation, and EM Industries, Inc. on the issue of the recovery available under CERCLA.[1] Defendants argue that the court should limit the plaintiffs' recovery to $424,000.00, representing the difference between the $519,000.00 paid by the government to the contractor which performed the cleanup of the site and the $95,000.00 received in settlement from former defendant Eaton Corporation.[2] The government contends that, in addi-

---

[1]COCC joined in these defendants' Motion after it was filed.

[2]Defendants mischaracterize the relief in question as "damages." The term "damages" is ordinarily associated with legal remedies. Not only does § 107(a) of CERCLA refer to "costs" rather than "damages", but the type of relief authorized by the statute is equitable restitution—a remedy designed to return plaintiffs to the finacial position they were in before incurring cleanup costs. *See* Porter v. Warner Holding Co., 328 U.S. 395 (1946); United States v. Long, 537 F.2d 1151, 1153-54 (4th Cir. 1975), *cert. denied*, 429 U.S. 871 (1976). *See also* United States v. Northeastern Pharmaceutical and Chemical Company, Inc., 579 F.Supp. 823 (W.D.Mo. 1984).

tion to amounts paid to the cleanup contractor, discounted by the Eaton settlement, it is entitled under CERCLA to recover administrative, investigative, and legal costs associated with the cleanup and this litigation. Plaintiffs also urge that the government is entitled to prejudgment interest.

In the main, this court finds plaintiffs' legal arguments persuasive and, therefore, denies defendants's motions. Moreover, reviewing the record in a light most favorable to defendants, this court concludes that there are no material issues of fact in dispute with respect to the amount of costs incurred, and that, therefore, Summary Judgment should be granted in plaintiffs' favor on the issue of costs. For reasons noted later in this Order, the court concludes that the facts of this case do not warrant the imposition of pre-judgment interest.

BACKGROUND

In June of 1984, before filing its Motion for Summary Judgment, the United States delivered to each defendant a detailed summary of the United States' costs relating to the Bluff Road cleanup. Defendants were informed that the documents underlying the summary were voluminous but would be made available for inspection upon request by defendants, and that the United States would consider any corrections, modifications, or comments that defendants might have in determining the final cost figure for the Bluff Road cleanup. In August of 1984, the United States, having received no requests, challenges, or comments from defendants relating to the cost summary, filed for Summary Judgment on the issue of costs. Attached to the United States' Motion was the cost summary delivered to defendants for comment.

At a hearing on August 28, 1984, the United States supplemented its Motion with affidavits of record custodians from both the United States Enviromental Protection Agency and the United States Department of Justice. Over objection by defendants, the court received the United States' cost summary and supporting affidavits as evidence.[3] The South Caro-

[3] In this court's view, the cost documents which underlie the government's cost summary are records of regularly conducted activity, which are subject to the hearsay exception provided by Fed.R.Evid. 803(6). The Federal Rules recognize the utility and

lina Department of Health and Environmental Control ("the State") also sought payment of administrative expenses associated with the Bluff Road cleanup.[4] The court granted defendants an additional sixty (60) days in which to conduct discovery of plaintiffs' underlying cost information for the purpose of plaintiffs' underlying cost information for the purpose of identifying issues of fact. Defendants were given fifteen (15) days after expiration of the discovery period to bring any issues of fact to the court's attention. Although the court is aware that some limited discovery was undertaken by defendants, defendants have not filed papers with the court showing a disputed issue of material fact within the requisite time frame.

Thus, in the absence of a showing of disputed issue of material fact, the court accepts plaintiffs' statement of costs incurred as true and accurate.

The United States initially stated costs of $1,157,242.89 in its cost summary. In papers subsequently filed with the court, the United States adjusted that figure, reducing an amount that had been overstated in the summary, calculating in an amount listed in the summary as committed but not yet paid, which was subsequently paid, and reducing the total by the amount received in settlement from Eaton Corporation. The United

---

admissibility of evidence summaries in circumstances such as this:

> The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at [a] reasonable time and place. The court may order that they be produced in court.

Fed.R.Evid. 1006. Pursuant to Rule 1006, summaries of evidence should be admissible whenever the underlying evidence would itself be admissible. *See* Ford Motor Co. v. Auto Supply Co., Inc., 661 F.2d 1171 (8th Cir. 1981); United States v. Foley, 598 F.2d 1323 (4th Cir. 1979); United States v. Consolidated Edison Co., Inc., 580 F.2d 1122 (2nd Cir. 1978). Because plaintiff's cost exhibit summarizes admissible documentary evidence and was properly authenticated by custodial affidavits, the summary and affidavits were admitted as evidence.

[4]The State followed up its demand at the hearing with a Motion for Summary Judgment filed September 18, 1984.

States' adjusted cost figure is $1,065,910.92.[5] This figure represents the cost of the cleanup itself, as well as administrative, investigative, and legal expenses associated with the cleanup and recovery of the federal government's costs. The State claims an additional $93,000 in administrative expenses which were not reimbursed by the federal government. Because the court accepts these cost figures as true, the only inquiry remaining is whether the government is entitled, as a matter of law, to recover all of these costs.

SCOPE OF RECOVERY

Persons held liable under Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), are responsible for "*all costs of removal or remedial action* incurred . . . *not inconsistent with* the national contingency plan ["NCP"] . . ." (Emphasis added). The statute limits the grounds for contesting government costs to the issue of consistency with the NCP, and places the burden of proof with respect to that issue on defendants. A recent decision in *United States v. Northeastern Pharmaceutical and Chemical Company, Inc.*, ("NEPACCO"), 579 F.Supp. 823 (W.D.Mo. 1984), is persuasive in this regard:

> Defendants argue that the plaintiff failed to prove that the costs incurred were reasonable and "not inconsistent with the national contingency plan." Initially, the Court finds that the burden of proving inconsistency with the national contingency plan was that of the defendants. This conclusion is evident from the language of the statute. To give meaning to every term in the statute, the Court reads the insertion of the word "not" immediately prior to "inconsistent" to mean that the defendants are presumed liable for all response costs incurred *unless* they can overcome this

---

[5]The figure does not include some expenses which are as yet incalculable. Specifically, the degree to which the federal and state governments will reimburse the cleanup contractor for cost overruns has not yet been resolved, and the amount of administrative expense incurred by the State and reimbursed by EPA has not been calculated. Moreover, federal administative and legal costs which have accrued from March of 1984, the date of the United States' last computations, up until the date of this judgment have not yet been calculated.

> presumption by presenting evidence of inconsistency. The content of section 107(a) (4) (B) lends support to this conclusion in stating that responsible parties are liable for "any other costs of response incurred by any other person *consistent with* the national contingency plan. . . ." (emphasis added). On its face, section 107(a) (4) (B) intends that a different standard apply to cost recovery by nongovernmental entities and that such entities must affirmatively show that their actions were consistent. . . . Congress had already made provision for the reasonableness of actions taken by the government. . . . Reasonableness is conclusively presumed to have been built into the plan. . . . As long as the actions taken by the government were in harmony with the national contingency plan, the costs incurred pursuant to those actions are presumed to be reasonable and therefore recoverable. If Congress had intended otherwise, they would have merely stated in section 107(a) (4) (A), "all reasonable costs," instead of the present language of "all costs."

Id. at 850-51. In this case, defendants have failed to prove that any of plaintiffs' costs were inconsistent with the NCP and have not identified any issue of fact with respect to those costs. Consequently, all costs within the scope of recovery under Section 107(a) of CERCLA will be allowed.

In *NEPACCO*, the Honorable Russell G. Clark concluded that CERCLA specifically allows for the recovery of all litigation costs, including attorney fees, and administrative and investigative costs associated with cleanups. *Id.* at 851-52. While this court is not without some misgivings about awarding attorney fees to the government for the services of its own lawyers, the broad language of the statute and the cogency of Judge Clark's comments in the *NEPACCO* opinion are persuasive. As noted above, under Section 107(a) of CERCLA, responsible parties are liable for "all costs of removal or remedial action. . . ." 42 U.S.C. § 9607(a). "Remove" or "removal" is defined by Section 101(23) of CERCLA to include "action taken under Section 9604(b). . . ." 42 U.S.C.

§ 9601(23). That provision, in turn, provides, in pertinent part, as follows:

> Whenever the President is authorized to act pursuant to subsection (a) of this section . . . [he] may undertake such *planning, legal,* fiscal, economic, engineering, architectural, and *other studies or investigations* as he may deem necessary or appropriate *to plan and direct response actions, to recover the costs thereof, and to enforce the provisions of this chapter.*

42 U.S.C. § 9604(b) (emphasis added). Because the response actions at the Bluff Road site were taken pursuant to Section 104(a) of CERCLA, this court concludes that all costs associated with the cleanup and this litigation are recoverable.

Plaintiffs seek an award of prejudgment interest on these amounts. The parties agree that CERCLA does not specifically address the issue of prejudgment interest. In the absence of express statutory provision, the question must be resolved by the courts. This court recognizes that some CERCLA actions may present circumstances in which an award of prejudgment interest is appropriate. *See NEPACCO,* 579 F. Supp. at 852. In this case, however, there is no indication that the defendants have been recalcitrant, deceptive or unreasonable. Moreover, defendants have not sought to delay either the cleanup activities or the progress of this case. Under such circumstances, this court declines to award prejudgment interest.

Accordingly, defendants are hereby adjudged liable, jointly and severally, to the United States in the amount of $1,065,910.92 and to the State in the amount of $93,000.00. The court understands that certain additional costs are as yet incalculable, and, therefore, grants plaintiffs sixty (60) days to file and serve affidavits supplementing the amount of the judgments entered hereby. Defendants are directed to file any opposing affidavits or other evidence concerning such additional costs within 30 days after plaintiff's affidavits are filed.

AND IT IS SO ORDERED.[6]

/s/ CHARLES E. SIMONS, JR.

UNITED STATES DISTRICT JUDGE

Aiken, South Carolina
November 20, 1985

[6]It is noted that this court has withheld executing and filing this Order for a considerable period of time awaiting the Eighth Circuit Court of Appeals' decision in *United States v. Northeastern Pharmaceutical and Chemical Company, Inc.*, 579 F.Supp. 823 (W.D.Mo. 1984) inasmuch as the court had received information that this case had been duly appealed to the Eighth Circuit. Since the Eighth Circuit has not at this time issued its Order in that case, the court has decided to go forward and execute and file the within Order.